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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 120

WILLIAM WARD EHLERT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LAWYERS' SELECTIVE SERVICE PANEL OF SAN FRANCISCO AS AMICUS CURIAE

Pursuant to the provisions of Rule 42, the Lawyers' Selective Service Panel of San Francisco has obtained written consents from all parties to file this brief as *amicus curiae,* which consents have been filed with the Clerk (Stern and Gressman, SUPREME COURT PRACTICE, 4th Ed., 1969, p. 320, n. 85).

The Panel consists of a group of lawyers who, under appointment by the judges of the Northern District of California pursuant to the Criminal Justice Act of 1964, 18 U.S.C. 3006A, have represented

over two hundred young men of conscience prosecuted because of their refusals to be conscripted.

The members of the Panel have observed the long, and sometimes tortuous, road that their clients have travelled from the time when, before they were even out of their teens, they were first required to register, to the time when some of them realized, as a result of the devastating impact of the receipt of an order to report for induction, that they could not conscientiously participate in war. For others of them that realization came at an earlier point in time; that "circumstance" gave them an opportunity to attempt to persuade their local boards of the *bona fides* of their claims. But there are those for whom the actual receipt of the order itself was what catalyzed their nascent feelings into the stern command of conscience. These, unlike their brothers whose consciences had spoken earlier, found that before they could even be heard on their claims, they had to surmount the barrier imposed by the Selective Service Regulation involved in this case. And now they have been told, by a sharply divided Court of Appeals, that their local boards may not even consider their claims of conscience simply because their beliefs crystallized too late. *Ehlert v. United States*, 422 F. 2d 332 (9 Cir. 1970).

We believe that the decision below is insupportable as a matter of law. Its Draconian nature is utterly hostile to Anglo-American concepts of law. The regulation on which it is based does not require the narrow construction forced upon it by the majority below.

As construed below the regulation is not supported by (indeed, it is contrary to) the underlying statute. If the statute may be read to permit such a construction, then it itself violates the Constitution.

For these reasons, and on behalf of those of our clients who find themselves in petitioner's situation, we file this brief urging reversal of the judgment below.

The questions are (a) whether Selective Service Regulation 1625.2 (32 C.F.R. 1625.2), providing that a local board shall not reopen a classification after the mailing of a notice to report, unless it first finds that there has been a change in status resulting from circumstances over which the registrant has no control, precludes a board from even considering a conscientious objector claim merely because the claim was filed after the mailing of the notice to report; (b) if so, whether the regulation is contrary to Section 6(j) of the Military Selective Service Act of 1967 (50 U.S.C. App. 456[j]); and (c) whether, if the act permits such a construction of the regulation, the act itself can be sustained against a challenge that it violates the First and Fifth Amendments to the United States Constitution.

It is our submission (a) that the regulation fairly construed, in the light of the policies expressed in the Selective Service Act, does not preclude a consideration of a claim of conscience filed after the mailing of an order to report; (b) that if, on the

other hand, it does preclude the consideration of such a claim, it is invalid as conflicting with Section 6(j) of the act; and (c) that if the act permits such a preclusion, it is unconstitutional.

SUMMARY OF ARGUMENT

1. A crystallization of a registrant's view on conscientious objection results in a change in his status from that of one who was not, to that of one who is, a conscientious objector. Such crystallization is of necessity a circumstance beyond the registrant's control. The proviso to Selective Service Regulation 1625.2 therefore does not, as a matter of law, preclude a local board from reopening a classification merely because the registrant submitted his claim for conscientious objector exemption after the mailing of the order to report for induction.

The view of the majority below that a registrant can control whether or when his conscience speaks to him is premised upon a notion of the nature of conscience which is at odds with this court's views. *Welsh v. United States,* ..... U.S. ....., 90 S.Ct. 1792, 38 U.S.L.Wk. 3486 (1970). Nor does the apprehension that full administrative review of such a claim might interfere with the operation of the Selective Service System justify the deprivation of the right to such review. *Mulloy v. United States,* ..... U.S. ....., 90 S.Ct. 1766, 34 U.S.L.Wk. 4509 (1970).

2. Since the statute, 50 U.S.C. App. 450(j), imposes no time limitation upon when a claim of consci-

ence must mature or be asserted, the regulation may not be construed so as to impose such a limitation on the claim.

3. A statute which distinguishes between registrants whose claims of conscience crystallize before and those whose claims of conscience crystallize after the receipt of an order to report for induction invidiously discriminates against the latter contrary to the requirements of the Fifth Amendment and violates their First Amendment rights as well.

ARGUMENT

I. SELECTIVE SERVICE REGULATION 1625.2 DOES NOT PRECLUDE A CONSIDERATION OF A CLAIM FOR CONSCIENTIOUS OBJECTOR STATUS MERELY BECAUSE THE CLAIM IS FILED AFTER THE MAILING OF AN ORDER TO REPORT

Judge Kilkenny's opinion for the majority below states:

> "We conclude that a crystallization of, or a change in, a registrant's views on conscientious objection is not a change in his status resulting from circumstances over which he has no control, within the meaning of 32 C.F.R. §1625.2" (422 F. 2d at 335).

While it is not clear from this whether the court is saying that a change from no objection to conscientious objection is not a change in status or whether it is saying that such a change is not one due to circumstances beyond the control of the registrant, a reading of all of the opinions below indi-

cates that the majority would probably accept as accurate the recent statement of the Court of Appeals for the Second Circuit that "ascension to conscientious objection is a change in status . . ." (*Paszel v. Laird*, ... F. 2d ....., [2 Cir. No. 34052, April 8, 1970], 2 S.S.L.R. 3591, 3592). It appears, rather, that the majority parts company with the Second Circuit when the latter holds that "the point in time when a registrant's beliefs form is a circumstance beyond his control" (*ibid.*, at 3592-3).

It is this failure to recognize that the registrant has control over neither the crystallization of his beliefs nor the point in time at which that occurs that is the fatal weakness of the majority opinion.[1]

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[1]Judge Duniway's concurring opinion (422 F. 2d at 335), asserting that the word "circumstances" indicates "some fact, act or event external to the mind or conscience of the registrant" rather than the "internal mental and spiritual processes of the registrant" is not confirmed, as he suggests, by dictionary definitions.

Even those he cites do not support the dichotomy he seeks to create. Those he neglects to cite completely destroy his argument:

"1. Something attending, appendant or relevant to a fact or event, either incidentally, or as an essential condition or a determining factor, as the *circumstances* of TIME, place and person are to be considered (capitalization supplied);

2. One or more of the *adjuncts* of a fact, which make it more or less criminal (italics supplied). Webster's New Twentieth Century Dictionary. Unabridged 2d ed., New York 1965.

If, as Judge Duniway says, crystallization does not result from "circumstances," then either all post-notice conscientious objector claims are governed by Section 1625.2 without any reference to the proviso, since the latter would not be applicable to claims of such a nature (*cf., United States v. Crawford*, 119 F. Supp. 729 at 730 [N.D. Calif., 1954]), or such claims could never be reviewed, a result which, as Judge Merrill points out (422 F. 2d at 338), singles out conscientious objector claims alone for such treatment and, in addition, is contrary to the language of the statute (*ibid.*, at 339; and see, *infra*, II).

The holding that the maturation of a claim of conscience is not a circumstance over which a registrant has no control is based upon a misconception of the nature of such a claim and, indeed, of human psychology.

This Court has explicated the nature of a claim of conscience in terms which make clear the psychological unsoundness of the views expressed by Judge Kilkenny. In *Welsh v. United States*, ... U.S. ....., 90 S.Ct. 1792, 38 U.S.L.Wk. 4486 (1970) decided after the decision below was rendered, the conscience that would qualify for the exemption was described as one *"so loud and insistent* that [the registrant] preferred to go to jail rather than serve in the Armed Forces." This Court noted the necessary profundity, depth and sincerity of the qualifying belief and said that it had to be such as would *"impose* upon [the registrant] a duty of conscience to refrain from participating in any war at any time." Finally, it held that Section 6(j) exempts from service only those whose conscences, *"spurred* by deeply held moral, ethical or religious beliefs, *would give them no rest or peace* if they allowed themselves to become part of an instrument of war." (*Welsh v. United States, supra*, 90 S.Ct. at 1795, 1796, 1798; 38 U.S.L.Wk. at 4487, 4489; italics supplied)

To say that the maturation of beliefs of this intensity—and they must be of this intensity to entitle the registrant to the exemption—is a circumstance which is not beyond the control of the registrant is simply to misunderstand the psychological make-up of human beings.

> "This [the majority view] strikes me as a disparagement of the concept of conscience most out of tune with the prevailing mores of the day. One simply cannot order his conscience to be still or make himself believe what he does not believe and I must reject the implication that it is right and proper that one should suffer loss of status for having failed to bring his conscience to heel.
>
> Conscientious objection, in truth, is a contradiction of control. Just as a conviction honestly dictated by conscience cannot be banished at the will of the holder, so, conversely, a belief conveniently subject to the control of the holder is not conscientiously entertained." (Judge Merrill dissenting below, 422 F. 2d at 339).

In any case, it cannot be said that the contrary analysis of Judge Kilkenny is so indisputably sound on psychological grounds as to require a construction of the proviso to 1625.2, which, *as a matter of law,* precludes a local board from considering such a claim just because it crystallizes after, rather than before, the mailing of an induction notice.

The majority opinion is based not upon any tenable psychological analysis, but rather, to quote Judge Duniway, upon "practical considerations" (422 F.2d at 335). These considerations are specifically said to be that, if the post-notice maturation of conscientious objector belief may be regarded as a circumstance beyond the control of the registrant, then "[t]he manpower quotas of Selective Service could

not be met with any degree of certainty"[2] and "orderly administration of the Selective Service System" will not be possible.[3] (422 F. 2d at 334).

Similar arguments recently advanced by the Government have been squarely rejected by this court:

> "The Government argues that if the local board must reopen whenever a prima facie case for reclassification is stated by the registrant, he will be able to postpone his induction indefinitely and the administration of the Selective Service System will be undermined. But the board need not reopen where the claim is plainly incredible, or where, even if true, it would not warrant reclassification, or where the claim has already been passed on, or where the claim itself is conclusively refuted by other information in the applicant's file. Moreover, a registrant who makes false statements to his draft board is subject to severe criminal penalties. 50 U.S.C., App. §462 (a)." (*Mulloy v. United States,* ..... U.S. ....., 90 S.Ct. 1766 at 1772, n. 7, 38 U.S.L.Wk. 4509 at 4511, n. 7 [1970]).

These factors are equally as applicable to a registrant whose beliefs crystallized upon the receipt of an order to report for induction as they are to a

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[2]A proposition for which no evidence is to be found in the record. We are not aware that in the Second or Tenth Circuits where the proviso has been construed to include, as a change in status due to circumstances over which the registrant has no control, post-notice maturation of his conscientious objector beliefs (see cases cited, infra, p. 14), the Government has had any difficulty meeting Selective Service manpower quotas.

[3]Once again, no evidence supports this assertion and we have not heard that the application of a contrary reading of the regulation has resulted in any disorder in the administration of the Selective Service System in the Second or Tenth Circuits.

registrant whose beliefs crystallized at some earlier point in time and as a result of some other circumstance—such as reading a book or seeing a movie or hearing a sermon.

When the regulations dealing with reopening are read in their entirety and in the light of *Mulloy* it seems clear that the judgment below cannot stand. The regulations, so far as is here relevant, provide that a local board "may" reopen and consider anew a classification if there are presented to it new facts which, if true, would justify a change in classification (Section 1625.2); that it "shall not" reopen the classification if no new facts are presented or if the facts presented would not justify a change in classification (Section 1625.4); and that it "shall not" reopen a classification after an order to report has been mailed, "unless [it] first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." (Section 1625.2, proviso).[4]

In *Mulloy*, a case involving the presentation of a conscientious objector claim prior to the mailing of an order to report, this Court held that, notwithstanding the permissive language of Section 1625.2,[5] a local

[4]The "crucial" difference between a reopening, even if a local board denies the requested reclassification, and a simple refusal to reopen was noted by this Court in *Mulloy*. In one situation the registrant has the right to a personal appearance and an administrative appeal; in the other he is not accorded those rights.

[5]And, necessarily, the mandatory language of that section's counterpart. For while this Court in *Mulloy* spoke primarily to Section 1625.2, it recognized that under Section 1625.4 a board "need not reopen" if no new facts are presented or if such facts would not justify a change in classification (*Mulloy v. United States, supra*, 90 S.Ct. at 1769, 38 U.S.L.Wk. at 4510).

board may not "arbitrarily refuse to reopen a registrant's classification," that its failure to reopen in a proper case constitutes "an abuse of discretion," and that the denial of a claim to reopen in the face of a *prima facie* showing is "an evaluative determination" that "cannot be made without affording the registrant a chance to be heard and an opportunity for an administrative appeal." The principal reason assigned for reaching this conclusion was the overriding fact that in selective service criminal prosecutions there is only a "narrowly limited scope of judicial review available to a registrant" and that, therefore, "the opportunity for full administrative review is indispensable to a fair operation of the Selective Service System." (*Mulloy v. United States, supra,* 90 S.Ct. at 1771, 38 U.S.L.Wk. at 4509).

In the opinion below, rendered before *Mulloy* was decided, no valid reason was assigned for requiring any lesser opportunity for full administrative review in a case in which the claim was made after, rather than before, the mailing of the order to report. As we have seen, the same "mandatory" language—"shall not"—appearing in the proviso to Section 1625.2 appears also in Section 1625.4, involved in *Mulloy*. If the "shall not" in the latter section does not preclude reopening in a proper case, the "shall not" in the proviso to 1625.2 ought not to have that effect either. As we have further seen, neither the psychological basis for the opinion of the majority below nor its arguments of administrative convenience can survive analysis.

There is thus nothing which requires the proviso to 1625.2 to be construed in any way other than to require a local board in a case such as this to determine whether there has been a change in status due to circumstances beyond the registrant's control, and where, as here, a *prima facie* case to that effect has been presented, to reopen the classification and thereby accord to the registrant the right of an appearance and an administrative appeal.[6] This, of course, does not mean that in every case of post-notice filing (or, indeed, in every case of a pre-notice filing) the local board is required to reopen and reclassify.[7] It does mean that the proviso to 1625.2 need not and should not be construed to preclude a board from reopening merely because the claim matured one day after,

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[6] *Amicus curiae* believes that the instant record sustains Judge Merrill's position that there was no issue in this case of any deficiency in the petitioner's showing (422 F. 2d at 338, n. 1). Indeed the trial judge made it clear that

> ". . . if there [sic] were a case in [the Second] Circuit, I would feel, *based on the record before me*, I would have to acquit the accused." (TR 31: 21-23; italics supplied).

And the local board specifically told petitioner that it was refusing to reopen his classification only because

> ". . . the information submitted on Selective Service System Form 150 was not a change in status which was beyond your control" (422 F. 2d at 333).

Judge Ely's attempt (422 F. 2d at 335) to decide the case on some other basis is thus not sustainable on this record.

In any case, the majority below decided, as a matter of law, that the regulation precluded a reopening and the issue therefore is squarely presented here.

[7] Indeed, neither the Second Circuit nor the Tenth has had any problem in sustaining a criminal conviction where the file shows a basis in fact for the board's refusal to reopen on the ground that the claimed belief arose prior to the induction order. *United States v. Delfin*, 419 F. 2d 226 [2 Cir., 1969]; *United States v. Maine*, 417 F.2d 951 (10 Cir. 1969).

rather than one day before, the mailing of the notice to report.

Since it must be true that there are at least some post-notice situations in which a reopening may be justified,[8] the regulation should not be construed as precluding the board from undertaking to ascertain whether or not the claim falls into one of those categories. If the board rejects the claim, after making such a determination, and if there is a basis in fact for its finding, that is one thing; but the court below should not have construed the regulation so as to prohibit the board from conducting such an examination. Its holding that, *as a matter of law,* crystallization can never be a change in status resulting from circumstances over which the registrant has no control is plainly erroneous.

II. SECTION 6(j) DOES NOT IMPOSE ANY LIMITATION UPON THE TIME WHEN A CONSCIENTIOUS OBJECTOR CLAIM MUST MATURE OR MUST BE ASSERTED

Section 6(j) of the Military Selective Service Act of 1967 and its predecessors express a deeply-rooted national policy that persons who are conscientiously

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[8]For example, in *Paszel v. Laird,* ..... F. 2d ....., *supra,* the court points out that, in the case of a claim made after a notice of induction, there are four possible combinations of facts, one of which—no conscientious objection before but conscientious objection after—would require the board to reopen. We need not attempt to rehearse all the situations which might or might not justify a post-induction notice reopening. All we urge here is that a local board should not be precluded as a matter of law from determining whether or not it should even consider reopening in such a case.

opposed to participation in war shall not be subjected to combatant training and service. It does not impose upon such persons any limitation upon the time within which such a claim must mature or must be asserted. On its face, the statute expresses an unambiguous mandate that no conscientious objector shall be required to serve in the armed forces. Since it does not impose a time limitation within which the claim must arise or must be made, a regulation which, on its face or as construed, purports to impose such a limitation must be stricken down as an effort to engraft upon a statutorily created exemption a condition not imposed by Congress. It is beyond the rule-making power of the executive to impose such a condition upon the exercise of a right granted by the statute (*United States v. Gearey*, 368 F. 2d 144 [2 Cir., 1966]; *United States v. Sandbank*, 403 F.2d 38 [2 Cir., 1968]; *Keene v. United States*, 266 F. 2d 378 [10 Cir., 1959]; *Martinez v. United States*, 384 F. 2d 50 [10 Cir., 1967]; *United States v. Maine*, 417 F. 2d 951 [10 Cir., 1969]; *United States v. Clark*, 105 F. Supp. 613 [W.D. Pa., 1952]; *United States v. Crawford*, 119 F. Supp. 729 [N.D. Calif., 1954]; *United States v. Underwood*, 151 F. Supp. 874 [E.D. Pa. 1955]; *United States v. Hinch*, 292 F. Supp. 696 [E.D. Mo., 1968]).

In *Gearey, supra*, the Court of Appeals for the Second Circuit said:

> "Section 6(j) does not set any time limit by which an applicant's conscientious objection must be fully crystallized in his mind. It would be improper to conclude that an individual is not a genuine conscientious objector merely because his beliefs did not ripen until after he received his

notice, although the belatedness of the claim may be a factor in assessing its genuineness." (368 F. 2d at 149-150).

In *Sandbank, supra,* it said:

"A registrant may have his application for conscientious objector status considered by the Local Draft Board even after the induction notice is issued provided he raises his claim promptly after it matures." (403 F.2d at 38).

In *Keene, supra,* the Court of Appeals for the Tenth Circuit said:

"Our question then is narrowed to whether the appellant is entitled to have his classification reopened and considered anew on the grounds of a change of status due to circumstances beyond his control. That is to say, a change of status due to a change of conscience occurring after the notice to report was mailed. If such change did occur, the board erroneously refused to reopen and review . . . (266 F. 2d at 384).[9]

Finally, in *Maine, supra,* it said:

". . . no circumstance not subjectively controlled, which could, *under law,* affect the draft status of a registrant can justifiably be excluded

[9]In the subsequent case of *Martinez v. United States, supra,* the same Court of Appeals noted, with apparent approval, that the trial judge had submitted this issue to the jury (384 F. 2d at 51). We need not concern ourselves here with whether the issue of fact presented is one for the court or the jury, as in the instant case the trial was to the court alone which, while resolving the fact issue in favor of petitioner, held, as a matter of law, that petitioner had to be found guilty solely because his sincere beliefs matured after the mailing of the order. See *supra,* n. 6.

from consideration." (417 F. 2d at 954; italics supplied).

In each opinion the court carefully observed that the lateness of the claim is a factor legitimately to be considered in assessing its sincerity. With this, of course, we have no quarrel. But each court made it equally clear that, as the statute is drafted, lateness *per se* is not to be regarded as a disqualifying factor. Yet, as construed by Judge Kilkenny, the proviso to Section 1625.2 has precisely the effect of imposing a time limit on the right granted by Congress.

While the statute authorizes the issuance of implementing regulations, that authorization is limited to the promulgation of only such regulations as are necessary "to carry out the provisions of this Act." (50 U.S.C. App. 460 [b][1].) The statute obviously does not authorize regulations which have the effect of destroying the very exemptions it grants.

In *Crawford, supra,* the Court said:

> "The statute . . . expressly provides [for the conscientious objector exemption] . . . the sole legal question . . . is whether an executive regulation may circumvent the clear language of the statute. To pose the question is to answer it. While Regulation 1625.2 is not invalid on its face, it can have no applicability to a claim of conscientious objection whenever made so as to deprive the objector of a hearing at which he may prove his good faith." (119 F. Supp at 730).

Furthermore, the statute explicitly provides that "*Nothing* contained herein" shall require a conscien-

tious objector to serve in the armed forces. (50 U.S.C. App. at 456[j]; italics supplied). In the face of this, Congress could not have intended to authorize a regulation which, either on its face or as construed, would compel a conscientious objector to serve or go to jail just because his claim did not mature until after the board mailed him a notice to report. Yet, as applied by the court below, this is precisely what Section 1625.2 does. This construction of the section must be declared by this Court to be invalid as contravening the statutory grant of exemption to conscientious objectors.

III. IF SECTION 6(j) PERMITS THE IMPOSITION OF A TIME LIMITATION UPON THE MATURATION OF A SINCERE CONSCIENTIOUS OBJECTOR CLAIM, THEN IT IS UNCONSTITUTIONAL AS VIOLATIVE OF THE FIFTH AND FIRST AMENDMENTS

There is no question but what the statute as construed below "creates two classes [of registrants] indistinguishable from each other" except that in the one case the claim of conscience matured prior to, and in the other case after, the mailing of the order to report. This is an "invidious discrimination" which denies to petitioner, and those of his class, the equal protection of the laws (*Shapiro v. Thompson,* 394 U.S. 618, 627 [1969]). *Cf. Bolling v. Sharpe,* 374 U.S. 497 [1954]).[10]

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[10]The "administrative" reasons assigned for the discrimination will not support it (*Mulloy v. United States, supra,* 90 S.Ct. at 1772, n. 7, 38 U.S.L.Wk. at 4511, n. 7), nor will any others. See pages 7-11, *supra.*

As Mr. Justice Harlan has observed:

> "If the exemption is to be given application, it must encompass the class of individuals it purports to exclude, [all] those whose beliefs emanate from a purely moral, ethical and philosophical source. The common denominator must be the intensity of moral conviction with which a belief is held." (*Welsh v. United States, supra,* 90 S.Ct. at 1806, 38 U.S.L. Wk. at 4493; concurring opinion).

And this is true whether or not the conscientious objection exemption is deemed to be required by the First Amendment or to be dependent on the will of Congress (*Sherbert v. Verner,* 374 U.S. 398 [1963]; *Speiser v. Randle,* 357 U.S. 513 [1948]; *cf. Skinner v. Oklahoma,* 316 U.S. 535, 541 [1942]; *United States v. Seeger,* 326 Fed. 2d 846, 851 [2 Cir., 1964]; affirmed, 380 U.S. 163 [1965]).

Petitioner, whose beliefs happened to mature after the mailing of the order to report, is nonetheless in the class encompassed within the exemption. The "denominator" of an intensely held belief is as "common" to him as it is to those registrants whose beliefs matured at an earlier date. To exclude petitioner from the benefits of the statutory exemption while granting it to others in the same class is to deprive him of the equal protection of the laws and is to render the statute itself violative of the provisions of the First Amendment.

Finally, if the statute may be read to permit the regulation to affect the claim of exemption depending upon whether it is asserted before or after the registrant's receipt of an order or before or after the registrant has acquired knowledge that an order has been issued, it would be inapplicable or invalid for the reasons already set forth. But when the regulation purports to deprive a registrant of conscientious objector status solely because of the time when the order was *mailed,* it (or the statute upon which the regulation is based) must be condemned also as a violation of the Due Process Clause of the Fifth Amendment. The fact that the board has mailed a notice has no reasonable relation to the question of whether the registrant's beliefs do or do not entitle him to the exemption. To make the resolution of that question turn on the fact of mailing is both arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Dated, San Francisco, California,
July 27, 1970.

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